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IN THE

Supreme Court of the United States

October Term, 1955

UNITED STATES OF AMERICA,
Appellee,

AGAINST

THEODORE TROCK,
Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI

HARRY KRAUSS,
Attorney for Petitioner,
1440 Broadway,
New York, N. Y.

HARRY KRAUSS
and
ALBERT SCHLEFER,
66 Court Street,
Brooklyn, New York,
Of Counsel for Petitioner.

LOWER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth-2-0689

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UNITED STATES OF AMERICA,

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THEODORE TROCK,

Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the United States Supreme Court:

Petitioner herein prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the order of the United States District Court in and for the Eastern District of New York, adjudging the defendant-appellant in contempt of Court for refusal to answer certain questions propounded to him before the Federal Grand Jury.

Opinions

The District Judge (Byers, J.), rendered no separate opinion in connection with the order adjudging the defendant-appellant in contempt. In connection with an application for bail pending appeal to the United States Court of Appeals, made before the District Judge, the

latter rendered a memorandum in denying such motion, which said memorandum is dated March 2, 1956 and is appended hereto. The memorandum is not officially reported.

The United States Court of Appeals in affirming the order, rendered three opinions, one by each of the several judges, two voting for affirmance and one dissenting and voting for reversal. The said opinions dated April 9, 1956, are appended herewith and have not yet been officially reported.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. Code, Sec. 1254(1). The jurisdiction of the District Court was invoked under Title 18 U. S. Code, Sec. 401 and pursuant to Rule 42(a) of the Rules of Criminal Procedure.

Question Presented

The judgment sought to be reviewed was dated and entered in the office of the Clerk of the United States Court of Appeals for the Second Circuit on April 9, 1956. The question presented thereunder is as follows:

Whether the defendant-appellant was deprived of the constitutional guarantee afforded him by the Fifth Amendment of the United States Constitution in being directed to answer certain questions placed to him before the Federal Grand Jury, and being adjudged in contempt of Court and sentenced to jail for refusal to comply with the direction of the Court.

Constitutional Provision Involved

Amendment V of the Constitution of the United States insofar as applicable to this case, provides as follows:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

Statement

(Page references are to transcript of record.)

The defendant, petitioner herein was called as a witness before the Federal Grand Jury in the Eastern District of New York in connection with an investigation being conducted by the Grand Jury with respect to the illegal transportation in interstate commerce of stolen property (3). About two years previously an indictment was returned in that same Court in the matter under investigation, against two individuals, one Isidore Hillman and the other Thomas Tanner (3). Isidore Hillman was convicted and sentenced to jail (3). Thomas Tanner has never been apprehended (3). The trade names allegedly used to accomplish the crimes were Gulf Trading Company of 220 Broadway, New York, N. Y. and Empire State Buying Company, 246—5th Avenue, New York, N. Y. (11). To accomplish the scheme, among other things, a form letter was used, one of which is attached to the application for bail before the United States Court of Appeals (43); on the letterhead of Gulf Trading Corp., 220 Broadway, New York, N. Y., dated December 12, 1952, and signed J. D. Fausto, making inquiry as to the possibility of procuring merchandise. The United States attorney advised the Court that in addition to the outstanding indictment "there are three other persons who have not yet been indicted, but

against whom the government may subsequently find indictments, should investigation provide them with enough evidence to warrant the return of such an indictment (4). We have reason to believe that the witness, Mr. Trock, *may have some knowledge of* operations, or may have some knowledge of the whereabouts of Mr. Thomas Tanner" (4). All of the questions put to the witness before the Grand Jury do not appear in the record, notwithstanding the witness' counsel's request that this be done so as to complete the record (31). The following questions appear in the record, however, and were placed before the witness (33):

1. Do you know Harry Baus?

2. Do you know William Cooper?

3. Do you know Isadore Hillman?

4. Did you ever operate any business in New York City?

5. Did you ever register any trade names with the County Clerk's office in the Boro. of Manhattan?

6. Did you ever have an office at 220 Broadway in the Borough of Manhattan?

7. Did you ever have an office at 246—5th Avenue, in the Borough of Manhattan?

8. Did you ever hear of the Gulf Trading Company?

9. Did you ever hear of the Empire State Buying Company?

10. Can you type?

11. Did you ever stay at the Hotel Victoria, New York City?

12. Did you ever use the name of Thomas Tanner?

13. Did you ever use the name of James Fausto?

The witness had been previously asked all of these questions by an F.B.I. agent in Boston (17), which is the place at which he resides and where he is employed. The Court excused the witness from the obligation of answering whether he had ever used the name of Thomas Tanner or Fausto (17), but directed that he answer all of the other questions. However, prior to adjudging him in contempt, the Court, as to each question, placed the following inquiries to the witness (16):

> "How would the answer to that question expose you to a criminal prosecution?"
>
> "I ask you again how the answer to that question would tend to expose you to a criminal prosecution."
>
> The witness replied: "On the same ground, that it might tend to incriminate and degrade me."
>
> The Court then pursued: "You are unable to give a reason?"
>
> The witness replied: "I feel that those questions lead to something that might tend to incriminate and degrade me."

The record indicates that substantially the same course was pursued with respect to each and every one of the foregoing questions placed to the witness.

Reasons for Granting the Writ

1. The majority of the opinions of the Court of Appeals are in conflict with the most recent decisions of the Supreme Court. More particularly, *Hoffman* v. *U. S.*, 341

U. S. 479, which apparently upheld the contention that the privilege must be sustained unless there be a basis for a finding that the answers could not possibly have a tendency to incriminate; *Greenberg* v. *U. S.*, 343 U. S. 918 reversing without argument on the authority of *Hoffman* v. *U. S.* and *Singleton* v. *U. S.*, 343 U. S. 944, similarly reversing without oral argument.

2. That the Constitutional guarantees of petitioner were definitely violated is clearly set forth in the dissenting opinion of Judge Medina and that the defendant's liberty is threatened unless the error is corrected.

3. That as indicated by the opinion of Chief Judge Clark herein, the inferior courts find it difficult under the present state of the authorities to apply the somewhat conflicting principles of the various applicable decisions and "await the Supreme Court's pilotage to go beyond the law as construed below." He is in sympathy with what he regards to be the developing law as expressed by Judge Medina and which to him would be the logical conclusions towards which the Supreme Court seems to be headed. Judge Clark states that it is not clear "that any honest claim of self crimination deliberately and positively made by the witness before the Grand Jury—a potential accused —must be respected".

Argument

The good faith of the petitioner in availing himself of the Fifth Amendment is not only undisputed, but was found as a fact by the Circuit Judges. The opinion of Judge Galston (48) raises no issue with respect thereto, while Chief Judge Clark (55) regards it as being one in which there is an "honest claim of self-incrimination, deliberately and positively made by a witness before a Grand

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Jury". Judge Medina (57), in voting for reversal, distinctly finds that the refusal is not due "to mere whimsy or scrupulosity, or reluctance to participate in the disclosure of criminality on the part of others".

The question involved is whether the burden is upon the witness to explain how there is any danger of self-incrimination before he may be excused from answering or whether he is entitled to the constitutional protection unless it affirmatively appears that no danger exists to the witness and that his only purpose is to protect others. Judge Galston, in affirming, felt that the rule in *Mason* v. *U. S.*, 244 U. S. 362, 365, cast the burden upon the witness. Chief Judge Clark in concurring for affirmance, felt that until the Supreme Court clearly indicated otherwise, he was constrained to follow that reasoning, but did so with reluctance and expressed sympathy for the contrary rule, stating that he would be relieved if the Supreme Court goes to the logical conclusion towards which it now appears to be headed, namely that any honest claim of the witness must be respected. Judge Medina, in dissenting, stresses the following reasons: (1) that the giving of a satisfactory explanation by the witness might well be more incriminating than the answers to the questions themselves and that to require the witness to prove the hazard might compel the surrender of the very protection which the Constitutional privilege is designed to guarantee. (2) That the surrounding circumstances and not the explanation by the witness is what must control the court in determining as to whether there is reasonable basis for the refusal. He even goes further than this case requires and says that only where scrutiny makes it highly probable that the refusal is due to mere whimsy or scrupulosity, or reluctance to participate in the disclosure of criminality on the part of others, the claimed privilege must be upheld.

We can hardly improve upon the statement of the facts as set forth in Judge Medina's dissenting opinion. Hillman and Tanner have been indicted. Hillman is now serving a prison term as a result of the conviction. Tanner has never been apprehended. The nefarious scheme was operated by means of the use of two trade names, i.e., Gulf Trading Corp., 220 Broadway, New York, N. Y. and Empire State Buying Co., 246—5th Avenue, New York, N. Y. The witness lives and is employed in Boston. He was called before the Grand Jury on the pretext that he might furnish information against others. Unless that be the basis, there is no justification for subjecting him to any inquiry. The F.B.I. had previously put him through the same questioning. He is now in effect asked under oath, whether he ever passed by the name of Thomas Tanner. This is tantamount to inquiring of him whether he is Thomas Tanner, the person indicted, whose whereabouts are unknown, and after whom there is a hot pursuit. He is also asked whether he ever passed by the name of James Fausto. Judge Medina's opinion sets forth in full a form letter bearing the name of J. D. Fausto, sent to various concerns in the name and on the letterhead of Gulf Trading Corp., 220 Broadway, N. Y. C., dated December 12, 1952, soliciting information as to merchandise for sale. This form letter was used as a means of effectuating the theft of the merchandise transported in interstate commerce.

While the Court did not require the witness to answer whether he had ever used the name of Tanner or Fausto, the questions could not be erased from the record and they furnished, in part at least, a setting for all of the other questions placed before the witness. Clearly these questions had no reference to any individual other than the witness himself and did not tend to divulge anything

with respect to criminality on the part of any one other than the witness.

If, as we believe with Judge Medina, the rule is that the witness must be protected unless it clearly appears that his claim is sham, the very fact that these questions were put to him are in themselves sufficient to establish the basis for honest fear of self-incrimination.

We refer to the language in *U. S.* v. *Doto*, 205 Fed. 2d, 416, wherein the opinion of the Second Circuit was written by Judge Clark himself purporting to follow the rule as set down by the Supreme Court, wherein he stated:

> "To sustain the privilege against self incrimination, it need only be evident from *implications* of the question, in the *setting* on which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Before continuing with our argument, we desire to draw to the attention of this Court, Judge Clark's attempt to distinguish the *Doto* case from this on the ground that circumstances "had definitely marked the accused as a well known and important criminal along the very lines which the prosecutor's questions closely pursued".

While it does not appear in the record in this case, it will not be denied by the United States Attorney we are sure, that on the question of bail, Judge Medina was handed what is purported to be a criminal record of this petitioner, so that if prior criminality be a premium, it exists in this case. However, it seems to us that it would be a sheer travesty to establish the rule that an individual, by virtue of his prior bad record, has greater Constitu-

tional protection than one who has never previously been within the toils of the law.

We are inclined to feel that Judge Clark has receded from the rule followed by him in the *Doto* case and that proper application of that rule to this case would have compelled a reversal. The reasoning behind the rule that a criminal is afforded a greater protection by virtue of that fact, is violative of the fundamental purpose of the Constitutional provision as we understand it. A person perfectly innocent of all wrong doing may create for himself a peril by answering, in that he furnishes a connective link which may be sufficient to sustain a charge against him, and he may be required to defend himself against an unwarranted charge at great expense and personal sacrifice and possibly with irremedial damage.

U. S. v. *Coffey*, 198 Fed. 2nd 438.

> "The Judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection, incrimination may be approached and achieved by obscure and unlikely lines of inquiry."

This, we understand, is a closer approach to the rationale of the ruling of the Supreme Court in

Hoffman v. *U. S.*, 341 U. S. 479.

It is for that reason as we understand, that the courts do not inquire as to whether the witness may be guilty or innocent before permitting him to avail himself of the Fifth Amendment.

Let us then in light of these rules follow up with the ensuing questions which are asked and attempt to discover whether there is no basis for fear on the part of the wit-

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ness. Thus, he is asked whether he knew an individual by the name of Baus or Cooper or Isidore Hillman, the convicted person. The U. S. Attorney indicated that additional indictments were being sought. It is fair to assume that these are the individuals sought. In themselves the questions appear wholly innocuous but they furnish the "setting". Further, we have the question whether the witness ever operated any business in New York City. Again we inquire how this can tend to incriminate anyone but himself and we also ask how an answer to a question as to whether the witness ever registered any trade name in the County Clerk's Office in the Borough of Manhattan, City of New York could implicate anyone other than himself. He is then asked whether he ever had an office at the address of the Gulf Trading Corp. at 220 Broadway, New York City, N. Y. How can this tend to involve anyone but himself? At least, there is basis for reasonable apprehension on the part of the witness. He is also asked whether he ever had an office at the address of the Empire State Buying Co. at 246—5th Avenue, New York City; whether he ever heard of the Gulf Trading Company, and whether he ever heard of the Empire State Buying Co., and to cap the climax, he was asked whether he ever stayed at the Hotel Victoria in New York City and whether he is able to type. As Judge Medina capably sets forth, the Fausto letter was a typewritten document, and hence, this question very likely would be a connective link with the typing of that particular letter, else why was it asked?

The claim of privilege was by no means premature. See what happened in the case of *U. S.* v. *St. Pierre,* 128 Fed. 2nd 979, Second Circuit. St. Pierre revealed to the Grand Jury that he had $5,000. on his person entrusted to him by a bookmaker to pay a bet. He refused to name the businessman who was to be paid off, claiming his privilege

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against self-incrimination. He was senten[illegible] days in prison for contempt. In affirming, Jud[illegible]aid: "We must be apprised in some more deper[illegible]anner than the mere statement of counsel why the [illegible]wer will incriminate the witness before we can allow [illegible] suppression of the truth". After the 30 days impr[illegible]ment, St. Pierre was again brought before the Court a[illegible] required to answer. He refused and as an excuse attempted to supply the element which the Court of Appeals found lacking. He confessed he carried the embezzled monies across the lines from New York to Canada but refused to give the name of the individual. He was again sentenced and at 132 Fed. 2d 837 the court held that the witness had confessed the elements of a crime and therefore could not withhold its details. Judge Frank, who induced the statement by his earlier opinion, now dissented. The rule therefore, as established by the Second Circuit in that case, served as a trap. If the Constitutional protection is to have any force at all, it must be recognized until and unless it is clear that it is being used merely as a means of avoiding disclosure of others.

The better rule and that which we deem to be the rule as established by the Supreme Court in its latest decisions, is that set forth in *U. S.* v. *Jaffe*, 98 Fed. Sup. 191:

> "A witness is not bound to explain how answers to apparently innocent questions might tend to incriminate him, in order to show that his refusal to answer the questions on such ground was not a subterfuge to avoid giving the required information and make clear that he had reasonable apprehension, *when circumstances rendered such apprehension evident.*"

And in *Re*: *Friedman*, 104 Fed. Supp. 419, it was held that a witness who refused to testify on the ground that

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his a[illegible] tend to incriminate him is not required to pro[illegible]e danger, since by so doing, he would be forced [illegible]ose the very facts which the privilege protects.

In *Ma[illegible]. U. S.*, 209 Fed. 2nd 225, after stating that the guilty as well as the innocent may avail themselves of the protection, the Court said:

> "* * * It is certainly clear that it (line of demarcation) should be drawn well short of the point where the interrogator might have the substantial chance of striking pay dirt."

To the question asked of this witness, we can do no better than to apply the language of the Court in the *Maffie* case. The type of questions to which he was then subjected could only have served to reenforce the impression that he was properly in the dock as an accused person.

Strangely enough, some of the questions asked in the *Maffie* case, which were condemned by the court, are strongly similar to those asked of this witness. Maffie was asked whether he had an occupation and what it was. The petitioner was asked whether he ever had a business in New York and whether he ever filed a certificate of doing business. Petitioner was asked if he ever called himself Tanner or Fausto. Maffie was asked whether he knew certain suspicious individuals. Petitioner was asked whether he knew three named persons whom we have the right to suspect are the persons against whom indictments are being sought. In fact, in our own case, sight must not be lost of the fact that the U. S. attorney said that indictments might be sought against three persons, only two of whom had been named. Those two persons were Baus and Cooper. Is it not reasonable to suppose that the petitioner might be the third person?

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Maffie was asked whether he knew the location of the Boston Hotel. Petitioner was asked if he ever stayed at the Victoria Hotel.

In the *Maffie* case, the Court at page 231 found that the District Court had applied the rule of the privilege too narrowly when it stated: "I have no evidence before me that this man was a participant at all".

Moreover, and of great significance, as Judge Medina felt, this witness was asked whether he could type.

We feel constrained to refer to the language of Justice Clark of the Supreme Court in the recent *Slochower* case decided April, 1956 and not yet officially reported, quoting with approval, *Brown* v. *Walker*, 161 U. S. 591, 610, to the effect that the Fifth Amendment is "one of the most valuable prerogatives of the citizen," reaffirmed in *Quinn* v. *U. S.*, 349 U. S. 155. Justice Clark added "the privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances".

It is our belief that the whole essence of the law and the proper manner of its application were interpreted and determined by this Court in its decision in the *Hoffman* case, 341 U. S. 479. Immediately before the *Hoffman* decision, in another case, one Irving Greenberg was subpoenaed before the Grand Jury and was asked whether he knew any numbers writers and after answering affirmatively was asked "Who?" He refused to answer. He was asked whether he used any telephones in connection with his business and he answered "Not my lawful business" but refused to answer whether he used it for any other business. He was held in contempt. When the case reached the Court of Appeals for the Third Circuit, the *Hoffman* case was still pending undecided and the Court of Appeals felt free to consider the matter in light of its

own decision in the *Hoffman* case. In affirming, the Court of Appeals 187 Fed. 2d 35, stated, "where, as here, the question was innocent on its face, all that the appellant was required to do was to satisfy the Court that there was a reasonable possibility of the existence of facts in his situation and under the circumstances of his case which might convict him of federal crime if a fact which might be disclosed by a direct answer to the controverted question were added to them".

It was further pointed out that Greenberg had not even shown himself to have the reputation of being a racketeer or underworld character. The Supreme Court at 341 U. S. 944 on an appeal in the *Greenberg* case, remanded it to the Court of Appeals for reconsideration in light of the intervening *Hoffman* decision. The Court of Appeals again affirmed, adopting the view that whereas Hoffman had the benefit of an unsavory reputation as a racketeer, Greenberg carried no such distinction and that therefore was not entitled to as much protection under the Constitution as a notorious gangster. It was on a second petition for a certiorari that the Supreme Court reversed without argument on the authority of the *Hoffman* case, 343 U. S. 918.

In the *Singleton* case, 193 Fed. 2d 464, the witness refused to divulge information with respect to the business of other individuals. He was held in contempt. The appeal to the Court of Appeals was argued two months after the first *Greenberg* decision. When the Supreme Court remanded the *Greenberg* case for reconsideration, the *Singleton* case was put on the calendar for reargument at the same time. Having learned from the *Hoffman* decision, the Court of Appeals decided that the formal record was not the exclusive criterion, 193 Fed. 2d 466. However, it decided that the case was a long step from the

Hoffman decision and the lower court was sustained. The Supreme Court granted certiorari and reversed without argument on the basis of both the *Hoffman* and *Greenberg* cases, 343 U. S. 944 and thus indicated its total rejection of the distinctions drawn by the Court of Appeals and vigorously upheld the fundamental purpose of the Fifth Amendment. Then, when the *Coffey* case came before the same Third Circuit Court of Appeals, 198 Fed. 2d 438, that Court, profiting from the experiences of the previous reversals, announced what we believe to be the correct rule, "we perceive no rational basis upon which the Court which reversed the Singleton conviction could affirm the conviction of Coffey in this case. Accordingly, the judgment of the District Court must be reversed."

The Second Circuit Court of Appeals has apparently shown itself loath to adopt this principle and as is demonstrated by the opinion of Judge Galston accepted by Chief Judge Clark, is still adhering to the outmoded rule that the witness carries a heavy burden of showing himself the subject of a hot pursuit before being permitted to avail himself of the Constitutional guarantee. Thus, that there is conflict in the decisions of the different circuits appears to be without question, as does the fact that the Second Circuit implores a clarification of what it conceives an existing obscurity, as indicated by the opinion of Chief Judge Clark in our own case.

This case therefore bears great importance not only to this defendant alone, whose fundamental rights we feel have been infringed upon, but also in the respect that it affords the opportunity for a clear and unquestionable statement by the Supreme Court which will be in the form of a directive to the lower courts such as is asked for by Chief Judge Clark.

WHEREFORE, it is respectfully requested that this Honorable Court issue the Writ of Certiorari to the Court of Appeals for the Second Circuit.

Respectfully submitted,

HARRY KRAUSS,
Attorney for Petitioner,
1440 Broadway,
New York, N. Y.

HARRY KRAUSS
and
ALBERT SCHLEFER,
66 Court Street,
Brooklyn, New York,
Of Counsel for Petitioner.

APPENDIX

Memorandum on Denial of Bail

March 2, 1956.

BYERS, D. J.

This case is so remote from all that was involved in the Maffie case, 209 Fed. (2) 225, that its citation is not helpful on this motion. Here there is no suggestion or statement by the witness that would support the inference that he had reason to fear that he would be implicated in any matter being investigated by the Grand Jury.

In the questions put to this witness, and in the statement of the Assistant U. S. Attorney, there is nothing to indicate that as to Trock there is any "chase" at all, let alone its becoming "too hot" or the "scent too fresh" (*U. S.* v. *Doto*, 205 Fed. (2) 416, at 418).

From aught that appears in this record, Trock cannot reasonably be described as a possible co-conspirator with any one, whereby a supposed link in an imaginary chain would be conjured into existence. I see no reason why he should be admitted to bail.

Motion denied. Settle order.

M. W. B.
U. S. D. J.

Opinions of United States Court of Appeals for the Second Circuit

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Before:

CLARK, *Chief Judge*,
MEDINA, *Circuit Judge*, and GALSTON, *District Judge*.

Appeal from the United States District Court for the Eastern District of New York, Mortimer W. Byers, *Judge*.

The defendant appeals from an order holding him in contempt for having refused to answer questions before the grand jury directed by the District Judge. Affirmed.

LEONARD P. MOORE, U. S. Atty. for Eastern District of New York, Brooklyn, New York (Marie L. McCann, Asst. U. S. Atty, Brooklyn, New York, Of Counsel), *for appellee*.

HARRY KRAUSS, New York City, *for defendant-appellant*.

GALSTON, *District Judge*:

On February 21, 1956 Theodore Trock, the defendant, appeared as a witness before the grand jury for the Eastern District of New York, and was asked certain questions which he refused to answer on the ground that the answers might tend to incriminate and degrade him. He was brought before the court, and after failing to state any reason why the answers might expose him to criminal prosecution was directed to answer eleven questions which had been put to him.

On February 23, 1956 he again appeared before the grand jury but refused to answer the questions which he had been directed to answer. Then he was brought before the court and the questions were put to him by the court in the presence of the grand jury. He refused to answer; and failed, so it is charged by the Government, to show any reason why the answers might tend to expose him to criminal prosecution. Thereupon he was summarily committed to the custody of the United States Marshal to be held in close confinement for a period of four months. He was informed that he might purge himself of the contempt by complying with the court's order.

The court minutes disclose that Miss McCann, an assistant United States Attorney, explained to Judge Byers that there was an indictment outstanding against a man by the name of Thomas Tanner, then a fugitive, and that a co-defendant, Isadore Hillman, had been convicted and was serving a sentence. The indictment had to do with the theft of certain goods in interstate commerce. Miss McCann explained that there were three other persons who had not yet been indicted, but against whom the Government might subsequently file indictments should investigation provide them with enough evidence. She added: "We have reason to believe that the witness, Mr. Trock, may have some knowledge of operations, or have some knowledge of the whereabouts of Thomas Tanner."

It appeared that Trock had been asked whether he knew one Harry Baus. At first he refused to answer. Subsequently he admitted, said Miss McCann, that he had seen Harry Baus in 1950. A third time, when asked whether he knew Baus, he refused to answer on the ground that it might tend to incriminate or degrade him.

The witness also refused to answer whether he knew Isadore Hillman. Likewise he refused to answer whether he knew a William Cooper. A succession of questions followed: "Did you ever operate any business in New York?"

"Did you ever register in any trade names in New York?" "Did you ever have any offices at 250 Broadway in New York?" "Did you ever have an office in 246 Fifth Avenue, New York City?" "Did you ever hear of the Gulf Trading Company?" "Did you ever hear of the Empire State Buying Company?" "Did you ever use the name of Thomas Tanner?" "Did you ever use the name of James Fausto?" "Can you type?" "Did you ever stay at the Hotel Victoria in New York City?"

The court requested the witness to stand before him, and the court asked him to explain why answering the questions whether he knew Baus, Hillman and Cooper would tend to incriminate him. Trock responded: "Well I honestly feel that making a statement there might incriminate me. That is just the way I feel." The following colloquy resulted:

> "The Court: What is there incriminating about knowing a person by the name of Baus?
>
> Mr. Trock: Well evidently these people are wanted for something and I don't feel like being incriminated with them.
>
> The Court: What is there that would tend to expose you to a criminal prosecution if you answer the question 'Yes, I do know him' or 'No, I don't know him'?
>
> Mr. Trock: Well, I honestly feel that way.
>
> The Court: You have said twice that you feel that way. Now, is that feeling based on a reason?
>
> Mr. Trock: Well, the reason I feel I am just better off not answering that question."

The court then asked how answering the question whether he operated a business in New York City could incriminate him, and the court's interrogation of the witness in respect to all the other questions resulted in the failure of the defendant to explain why answers to those questions would

tend to incriminate him. He was thereupon ordered to answer all these questions. He was not ordered to answer questions about Thomas Tanner and James Fausto.

The defendant contends that the entire setting of the examination must be considered by the court, and that where it can be observed that the refusal to answer is not capricious, and where there is some basis for apprehension on the part of the witness, the court may not substitute its judgment for that of the witness. Defendant argues that the court in interpreting the refusal to answer need not base it upon a positive showing of incrimination.

Nevertheless, in appraisal of these eleven questions, when viewed independently each one is certainly free of any criminal suggestion. It does not require the opinion of a psychologist to establish that one laboring under a guilt complex when appearing before a grand jury might decline to answer any and all questions propounded to him; but such an attitude in and of itself would not protect such a witness from the necessity of complying with a court order to answer questions which were free from criminal implication, and not part of a link or setting connoting criminal implication.

We approach then a study of cases which bear on the legal principle involved.

Chief Justice Marshall in *In re Willie*, 25 Fed. Cas. No. 14692(e), pp. 38, 39, said:

> "The principle which entitled the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule, and of the exception to that rule, by observing that course which it is conceded courts have generally observed. It

is this: When a question is propounded it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may incriminate himself, then he must be the sole judge what his answer would be."

The foregoing passage is quoted in *Mason* v. *United States*, 244 U. S. 362, 365. In that case, Justice McReynolds added:

> "The Constitutional protection against self-incrimination 'is confined to real danger and does not extend to remote possibilities out of the ordinary course of law.' Heike v. United States, 227 U. S. 131; Brown v. Walker, 161 U. S. 591."

United States v. *Doto* (2 Cir.), 205 Fed. 2d 416, led Judge Clark to review leading authorities bearing on the question involved, including *Hoffman* v. *United States*, 341 U. S. 479; *Blau* v. *United States*, 340 U. S. 159; *Rogers* v. *United States*, 340 U. S. 367; and *Mason* v. *United States*, *supra*. In *Hoffman* v. *United States*, the question presented involved business dealings of a person publicly charged with being known as an underworld character and a racketeer with a twenty year police record, including a prison sentence on a narcotics charge. The questions he refused to answer pertained to the nature of his present occupation and his contacts and connections with, and knowledge of the whereabouts of a fugitive witness sought by the same grand jury, and for whom a bench warrant had been requested.

Judge Clark, referring to the opinion of Mr. Justice Clark, quoted the following passage from the *Hoffman* case:

"The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (Patrica) Blau v. United States, 1950, 340 U. S. 159, 71 S. Ct. 223, 95 L. Ed. 170. But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. Mason v. United States, 1917, 244 U. S. 362, 365, 37 S. Ct. 621, 622, 61 L. Ed. 1198, and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, Rogers v. United States, 1951, 340 U. S. 367, 71 S. Ct. 438, 95 L. Ed. 344, and to require him to answer if 'it clearly appears to the court that he is mistaken.' Temple v. Commonwealth, 1881, 75 Va. 892, 899. However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Applying then the test suggested in *Hoffman* v. *United States, supra*, to the facts of this case, it is not possible to find the presence of such a chain as is indicated in the Supreme Court opinion. There is no showing that the

questions asked will "link" the witness with any criminal activity. See also *United States* v. *Costello,* 222 Fed. 2d 656, 661 (2 Cir.); cert. den'd 350 U. S. 847.

It is for the court to determine whether silence is justified. In the instant case the appellant is not a notorious criminal or racketeer, nor apparently is anyone else whose name was mentioned in the hearings before the district court.

For other authorities see *Elwell* v. *United States,* 275 Fed. 775. In that case the court followed the rule in *Mason* v. *United States, supra,* in affirming an order of the district court directing the witness to answer the question put to him before the grand jury whether he knew the name of a man who wrote an article which appeared in the Chicago Evening American on a given date.

United States v. *Herron et al.,* 28 Fed. 2d 122, held that a witness has no arbitrary right to decide the question of privilege.

O'Connell v. *United States,* 40 Fed. 2d 201, 204 (2 Cir.). In this case the witness refused to answer whether he was in business and whether he knew certain individuals. The grand jury was investigating a lottery which, as Judge Swan observed, almost always involved some use of the mails. He said:

> "The questions asked were apparently relevant, or at least were a proper introduction to further inquiries, which might elicit information that would lead to prosecution of crime. The appellant was not privileged to refuse to answer unless his answer would have a direct tendency to incriminate him; a remote or speculative possibility of danger is not enough." *Mason* v. *United States,* 244 U. S. 362; *United States* v. *Sullivan,* 274 U. S. 259.

As to some twenty-five questions, excluding some which related to bets through the Albany Pool, Judge Swan said:

> "* * * there are still plenty left of a type which he could not refuse to answer. His persistence in prematurely claiming the privilege and refusing to answer will justify a finding of contumacy." p. 204

In *United States* v. *Flegenheimer*, 82 Fed. 2d 751, the indictment alleged that the name Harmon was used as an alias by Flegenheimer, who was on trial. A witness, Dilarmi, when sworn at the trial, made a statement that he would decline to answer any question concerning a bank account in the names of "Joseph Harmon and Rocco Dilarmi." No question concerning the bank account was propounded, but the witness was asked whether he knew Joseph Harmon. He declined to answer, claiming privilege of self-incrimination. The court held that whether the witness answered "Yes" or "No" could not possibly incriminate him, and that under the doctrine of *Mason* v. *United States, supra; United States* v. *Weinberg*, 65 Fed. 2d 394, and *Abrams* v. *United States*, 64 Fed. 2d 22, it was established law that to justify silence under the claim of the Constitutional privilege, it must appear that the answer which might be given would have a direct tendency to incriminate.

It has not yet been said by the Supreme Court that questions innocuous in themselves in a "setting" or chain, such as is revealed in the record before us, would justify the witness in refusing to comply with the court order.

Should the witness decide to comply with the court order, in such event, if a second run of questions were propounded based on such answers as the witness might give to the foregoing innocuous questions, and were such second run questions to present a "hot pursuit," the time would then

have arrived for a valid claim of immunity. But as the matter now stands, to quote Judge Swan, "his persistence in claiming privilege is premature."

The order of commitment is affirmed. This eliminates the appeal from the denial of the motion for bail.

CLARK, *Chief Judge* (concurring in affirmance):

The opinions of my brothers herein well set forth the present state of the authorities and the difficulties facing an inferior court in trying to apply the somewhat conflicting principles of the various applicable decisions. I am constrained to believe that, while Judge Medina may be stating the law of the future, Judge Galston is stating the law of the present, which is binding upon us. Let me say at once that I am in sympathy with what seems to be the developing law; I shall be relieved, rather than otherwise, if the Supreme Court goes to the logical conclusion toward which it appears to be headed, namely, that any honest claim of self-crimination, deliberately and positively made by a witness before a grand jury—a potential accused—must be respected. I heartily agree that the Fifth Amendment should be preserved, not diluted by doubtful interpretation—preserved more for the benefit of those of us who would demonstrate a true belief in democracy and the potent power of our democratic institutions than of the immediate beneficiaries of its claim. And unless we go as far as I have indicated, we do not have any satisfactory working principle to guide prosecutors and courts or to shield a potential accused.

But, trying to apply the law as it has been stated, I do think it clear that to grant the claim here would mark at least a step beyond any yet clearly taken. We may note

the contrast with our previous most extensive holding, *United States* v. *Doto*, 2 Cir., 205 F. 2d 416. There outside circumstances, notably the Senate crime investigation of the Kefauver committee, had definitely marked the accused as a well-known and important criminal along the very lines which the prosecutor's questions closely pursued. Here it is only upon a series of assumptions involving the existence of conspiracy and the close connection of the defendant therewith that we can make the forced deduction of self-crimination. Among these assumptions must be (a) that a single dubious question, even though excluded—here the use of the names Tanner or Fausto—makes a setting of danger which carries over to other questions themselves innocent; (b) that inquiries as to residing or carrying on of business in New York City or in particular places therein are taboo; (c) that also taboo are questions as to the witness's capabilities, such as the ability to use a typewriter; and (d) that inquiry cannot be made as to persons named, but otherwise unidentified. Of course on the primary assumptions stated, answers to questions such as these may easily be part of a web leading to conviction. But under the heretofore rule, it was just such assumptions which could not be made without something definite in the case to show the innocent appearing questions actually to be deadly. To turn the statement around, I suggest that if these questions without more are incriminating, then there is literally no question as to the witness's activities, capabilities, or acquaintances which he need answer. If the law is going that far, I think for many reasons, including proper respect for it, that the step should be done directly in the manner suggested above. It should not be accomplished by a form of indirection which can only puzzle prosecutors and courts and lead them to waste their time and energy in refinements of distinction without substance, while some witnesses are jailed and others are freed under

quite similar circumstances. So I think we must await the Supreme Court's pilotage to go beyond the law as construed below.

MEDINA, *Circuit Judge* (dissenting):

I dissent and would reverse the conviction adjudging appellant guilty of contempt for asserting his constitutional privilege and refusing to answer the questions put to him before the Grand Jury.

The basic error, as I see it, is disclosed by the attempt on the part of the District Court to induce appellant to explain in a satisfactory manner how answering the questions would incriminate him. When appellant said "I honestly feel that making a statement here might incriminate me," the Court replied, "That won't do."

But the giving of a satisfactory explanation might well have been more incriminating than answers to the questions; and we have held that to require the witness "to prove the hazard in the sense in which a claim is usually required to be established in court," would compel the surrender of "the very protection which the privilege is designed to guarantee." *United States* v. *Doto*, 2 Cir., 205 F. 2d 416, 417; see also *United States* v. *Coffey*, 3 Cir., 198 F. 2d 438. The protection of the Fifth Amendment would be a mere mockery if the witness could avail himself of the privilege only by demonstrating his guilt.

Thus it is to the surrounding circumstances and not to explanations by the witness that the Court must look to see whether the refusal to answer has some reasonable and credible basis. If such a scrutiny makes it highly probable that the refusal is due to mere whimsy, or scrupulosity or reluctance to participate in the disclosure of criminality on the part of others, then the witness must answer

the questions or take the consequences, even if his friends or relatives are the ones against whom prosecution seems imminent or possible.

What is the background here? Two indictments had already been handed down in the United States District Court for the Eastern District of New York charging Isidore Hillman and Thomas Tanner with theft of goods in interstate commerce. The indictments are not before us, but it does appear that Hillman pleaded guilty and is now serving the term of imprisonment imposed upon him by the judgment of conviction. We also know that the Gulf Trading Corp., at 220 Broadway in New York City, is involved and that there are "three other persons," whose names have not been disclosed, against whom indictments may subsequently be found. The full record of the questions put to appellant has not been furnished but some of his answers to a few of the questions appear in the record and will be referred to shortly. The claim of the prosecution is that appellant "may have some knowledge of operations or have some knowledge of the whereabouts of Mr. Thomas Tanner." All we know about appellant is that he comes from somewhere in Massachusetts and that he vigorously insists that answers to the questions may involve him in some charge of conspiring with Hillman, Tanner and others in connection with the alleged theft of goods in interstate commerce or other federal crimes.

What should give us pause at the outset and is perhaps sufficient to dispose of the entire matter before us is that two of the questions put to appellant were, whether he ever used the name of Thomas Tanner, the missing fugitive from justice, and whether he ever used the name of James Fausto, a man connected with the purchasing department of Gulf Trading Corp. When appellant was brought before the judge for rulings on the questions these two were excluded, but they had been asked and the prosecutor

thought them of sufficient importance to request the judge to direct the witness to answer them. This could scarcely have failed to impress appellant with the fact that he was at least suspected of using as aliases the very names of the fugitive and a person who might well prove to be the leader of the whole group. Moreover, in accord with what we considered in *United States* v. *Scully*, 2 Cir., 225 F. 2d 113, 116, to be the practice in this circuit, appellant was "advised that he had the right to refuse to answer questions on the ground of incrimination." Furthermore, he had been asked these same questions by an FBI agent in Boston.

Other circumstances, viewed in their relation to one another, constituted such a pattern of suspicion, as to more than amply justify appellant's expressed belief that answers to any of the questions might provide leads to further disclosures, the inevitable or at least the probable effect of which would have been appellant's indictment for conspiracy or as a principal in the alleged scheme of stealing goods in the course of interstate shipment.

Thus, immediately after the question about using the name of Fausto, came another question, "Can you type?" The District Court saw no deprivation of constitutional rights in compelling appellant to answer this question. But the following letter, the authenticity of which is not disputed, makes it reasonably clear that someone whose real or assumed name was Fausto was participating in alleged illegal transactions through the instrumentality of Gulf Trading Corp. at 220 Broadway in New York City, and doing so by the use of typewritten documents. The letter follows:

"GULF TRADING CORP.,
220 Broadway, New York 38, N. Y.

December 12, 1952

Gentlemen:

We are in the process of planning our future requirements. Possibly, your line may fit into our general picture.

Do you have a local representative or sales office in this area, whom we may contact for samples and further information?

Kindly send us descriptive literature, illustrations; quantity and trade discounts; delivery time and F. O. B. point; plus any other material your (*sic*) may deem helpful.

Your prompt reply would be appreciated.

Very truly yours,

J. D. Fausto

Purchasing Dept.

JDF/AM"

Perhaps the government may some day claim that appellant is none other than the Fausto who signed the letter, that he typed it himself in order that no subordinate could be in a position to testify against him, and that he is in fact one of the "three other persons" the prosecutor is looking for.

But this is not all. The first question he refused to answer was whether he knew one Harry Baus. Appellant admitted that he had seen Harry Baus in 1950, but refused to go further. His objection to answering the question whether he knew Hillman who had pleaded guilty and was in jail, was ~~sustained~~ also overruled. A similar question about William Cooper was held to be proper. Immediately after the ques-

tions about Baus, Hillman and Cooper, came another question "Did you ever operate any business in New York"; and other questions related to his having registered in any trade names in New York, whether he ever had any offices at 220 Broadway, New York City, the address of Gulf Trading Corp., or at 246 Fifth Avenue, New York City, whether he ever heard of the Empire State Buying Company, which also appears to have been involved in the illegal operations, and whether he ever stayed at the Hotel Victoria in New York City.

The inference from all this is inescapable, it seems to me, that appellant may turn out to be one of the unnamed and unidentified missing men, or to have participated in some direct or remote way in the illegal scheme, and that any information provided by answers to any of the questions may complete or lead to the completion of the chain of proof against him. In that event it would of course be of no avail to appellant that the prosecutor now tells us the the investigation is not consciously aimed at appellant. Perhaps each question, standing alone and by itself, may seem innocuous. But, taken together, they fully support appellant's claim that to answer them may incriminate him.

Despite all the hue and cry against the Fifth Amendment it still stands as one of our fundamental constitutional rights and we must be zealous to preserve it, rather than to weaken and dilute it by interpretations of doubtful validity.